

STATE OF MICHIGAN
COURT OF APPEALS

KIRK LEAPHART,

Plaintiff-Appellant,

v

CITY OF DETROIT, CITY OF DETROIT LAW
DEPARTMENT, RICHARD GOLLMAN, and
PAULA COLE,

Defendant-Appellees.

UNPUBLISHED

March 27, 2007

No. 271050

Wayne Circuit Court

LC No. 06-608845-NO

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition on the basis of governmental immunity. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedure

On August 30, 2005, plaintiff filed a claim against the City of Detroit asserting he received physical and emotional injuries as the result of police brutality. As part of the investigation of the claim, the City of Detroit requested that plaintiff submit a medical authorization that included the language, "your protected health information will be disclosed to any agency involved in the investigation, evaluation and resolution of your matter as it relates to the City of Detroit." Plaintiff failed to submit the authorization. In a letter dated October 26, 2005, the City of Detroit Law Department denied plaintiff's claim for "failure to comply with the medical authorization request requested by the City of Detroit."

Plaintiff filed suit seeking damages for the City of Detroit's denial of his claim. Plaintiff named the City of Detroit, City of Detroit Law Department, Paula Cole (the claims supervisor), and Richard Gollman (an investigator in the claims section of the Law Department) as defendants. He asserted violations of the Michigan Constitution, 1963, art 1, §§ 3 and 17, arguing that defendants violated his right to petition the government for redress of grievances and to a fair executive investigation by denying his claim. Plaintiff claimed defendants were not entitled to governmental immunity because their action in denying his claim constituted ultra vires conduct and gross negligence. Defendants filed a motion for summary disposition pursuant

to MCR 2.116(C)(7) and (8), asserting that they were immune from tort liability. The trial court granted defendants' motion.

II. Legal Analysis

This Court reviews de novo the lower court's grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). When considering a motion brought under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, when considering a motion brought under both MCR 2.116(C)(7) and (C)(8), it is proper for this Court to review all the material submitted in support of, and in opposition to, the plaintiff's claim. *Patterson v Kleiman*, 447 Mich 429, 431-435; 526 NW2d 879 (1994).

The governmental immunity act provides governmental agencies like the City of Detroit with "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function." *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984); MCL 691.1402 *et seq.* To survive a (C)(7) motion raised on these grounds, the plaintiff must allege facts warranting the application of an exception to governmental immunity, *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997), or facts showing the agency was engaged in an ultra vires activity. *Herman v Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004).

We conclude plaintiff failed to demonstrate that defendants' action in denying his claim for failure to submit a medical authorization constituted an ultra vires act. The determination whether an activity was a governmental function must focus on the general activity and not the specific conduct involved at the time of the tort. *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003). Defendants requested a medical authorization to investigate plaintiff's claim. When he failed to submit it, defendants denied his claim. Nothing supports the conclusion that defendants were operating outside their governmental function.

We also conclude plaintiff failed to demonstrate that defendants' actions constituted gross negligence. Gross negligence is statutorily defined as "conduct so reckless as to demonstrate a substantial lack of concern of whether an injury results." MCL 691.1407(7)(a); see also *Oliver v Smith*, 269 Mich App 560, 565; 715 NW2d 314 (2006). Evidence of ordinary negligence does not create a material question of fact concerning gross negligence. *Maiden, supra*, 130 n 11. Nothing in plaintiff's pleadings and supporting material supports the conclusion that defendants were grossly negligent in denying his claim for failure to submit the medical authorization.

Finally, the fact that plaintiff has alleged tort claims based on the Michigan Constitution, 1963, art 1, §§ 3 & 17 does not mean they will survive the governmental immunity finding. Our Supreme Court has declined to infer a damage remedy for a violation of the state constitution by a municipality or individual government employee since other remedies are available against such defendants. *Jones v Powell*, 462 Mich 329, 334; 612 NW2d 423 (2000).

Because plaintiff has failed to set forth facts demonstrating ultra vires activity or gross

negligence by defendants, the trial court properly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (8).

Affirmed.

/s/ Brian K. Zahra

/s/ Richard A. Bandstra

/s/ Donald S. Owens